No. 22,698

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MILLER BREWING COMPANY,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

RESPONDENT'S BRIEF.

GIBSON, DUNN & CRUTCHER,
WILLARD Z. CARR, JR.,
634 South Spring Street,
Los Angeles, Calif. 90014,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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RESPONDENT'S BRIEF.

Jurisdiction.

The Respondent concedes the jurisdiction of this Court as set forth in Petitioner's Brief (Pet. 1-2).[1]

Statement of the Case.

As stated by Petitioner ". . . [T]he Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain about plant rules which the Company unilaterally issued." (Pet. 2). If this case

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[1]References to the pleadings, decision and order of the Board and other papers reproduced as "Volume I, Pleadings", are designated as "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated as "Tr." References designated "R. Exh." and "G.C. Exh." are to the exhibits of Respondent and the General counsel, respectively. References designated "Pet." are to portions of Petitioner's Brief.

involved nothing more than a bare refusal to bargain over plant rules by an individual company with a duly certified union, this case would not be before this Court. In fact, the Court may question why this case is of sufficient significance to either the Board or Respondent to be the subject of a Petition for Enforcement.

We submit that the case should not be before the Court, that the charge should have been dismissed, and that rather than effectuating the policies of the Act, to grant enforcement would be inimical to the policies of the Act.

The easy course for Respondent would have been to "bargain" when the Union[2] initially made its demand concerning the plant rules or to have "bargained" at any further stage of the proceeding. We do not believe on the basis of the record and the admissions by the Union witnesses as to the recognition and acceptability of practically all of the plant rules, that negotiations would be that onerous considered in a vacuum. However, for the reasons set forth the principles in this case transcend the limited narrow question of negotiations over plant rules.

These reasons include:

1. The demand for bargaining upon Respondent directly and alone was inadequate, improper and in derogation of the authority and status of the established industry-wide collective bargaining unit and the designated industry representation. The California Brewers Association was the representative of all the companies, had engaged in all the negotiations with the Union for

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[2]International Association of Machinists and Aerospace Workers, AFL-CIO.

a good many years, and in fact through its predecessor was a party to the certification by the Board of the Union as the bargaining representative. The Board would improperly place the burden upon the Respondent to advise the Union of the correct procedure to request bargaining rather than requiring the Union to make a proper demand as the Union did not.

2. There was no refusal to bargain in that the rules did not substantively and unilaterally change working conditions but were merely and basically a codification of existing rules, some previously posted and most generally well known to the employees. The rules were not unusual or extreme, but are common in the industry and in most industrial plants. Some of the rules such as those prohibiting gambling are no more than consistent with State law. Under the circumstances here, particularly when there was no proper demand upon the duly designated representative, to bring to bear the full force of the Board and a Court enforcement of such order is not consistent with and will not effectuate the policies of the Act.

3. The Union waived any right to insist upon bargaining concerning issuance of the plant rules by Respondent in view of the provisions of the agreement and the unilateral promulgation and use of plant rules by other companies, members of the same collective bargaining unit. The rejection of this argument by the Board points up its determination to require individual bargaining on matters which the Board contends affect only individual companies. The impact of any negotiations by Respondent would, of course, have been felt by the Association and its members and any negotiations on plant rules themselves were clearly and properly a

matter to be considered as part of industry-wide negotiations.

4. Any question as to whether there was a waiver and whether the Respondent had the right under the agreement to issue the plant rules was a matter properly subject to the contractual grievance and arbitration procedures. As stated, the subject matter of this unfair labor practice proceeding should not be before the Court but should have been left to the procedures agreed upon and available to the parties.

5. As of the time of the 1967 negotiations, following the hearing in this matter, the Union was well advised and instructed concerning Respondent's position that negotiations were to be conducted upon proper demand to the Association. Although the Union bargained with the Association on various contract matters in 1967, there was no demand to bargain concerning the right of a company to issue rules unilaterally or the rules themselves. This constitutes a further waiver and abandonment by the Union of any right to bargain on these plant rules and we submit there is no present or continuing proper bargaining demand.

Statement of the Facts.

Petitioner summarized some of the salient facts (Pet. 2-5). However, we believe that we must set forth our own statement of facts, some of which will be repetitious of those set forth by the Petitioner but are necessary for a proper understanding and resolution of the important issues presented.

Since 1950 the charging party, the Union, has been the certified representative of certain craft employees employed as machinists by members of the California

Brewers Association (formerly California State Brewers Institute[3]). Although some changes have occurred in the employers, the Association has continued to be the established and recognized representative of the members. The present members include Anheuser-Busch, Inc., Pabst Brewing Company, Jos. Schlitz Brewing Company, Theo. Hamm Brewing Company, Miller Brewing Company and General Brewing Corporation (formerly known as Lucky Lager Brewing Company and prior to the acquisition by Respondent, the owner of the Azusa plant) [R. 17].

There is no evidence of any negotiations or demand for negotiations on an individual employer or plant basis prior to the demand of the machinists in this case. Negotiations have always been conducted on an industry-wide basis through the California Brewers Association. The Association is a nonprofit California corporation, having as one of its principal purposes the negotiation and administration of collective bargaining agreements. All of the companies referred to above are members of the Association and bargain through the Association. Individual employers do not bargain on an individual basis but rather master agreements are negotiated which are signed by representatives of the Association. This is the procedure with all of the various unions including the Teamster Brewery and Soft Drink Workers Joint Board of California, the union representing the majority of the employees [R. 17; Tr. 11-12].

Negotiations with the Machinists Union have been conducted over the last number of years including nego-

[3]See *California State Brewers Institute*, 90 NLRB 1747.

tiations in 1956, 1957, 1958, 1960, 1962, 1964 and 1967 [R. 17; Tr. 13].

The only evidence of any demand for bargaining concerning plant rules by any of the unions on the Association was by the Teamster Brewery and Soft Drink Workers Joint Board of California in the 1964 negotiations. At that time the demand was resisted by the industry through the Association and no provision was included in the collective bargaining agreement concerning the issuance of plant rules [Tr. 75].

On May 1, 1966, Respondent acquired the Azusa plant of General Brewing Corporation. From May 1 to October 24, 1966, the Respondent was engaged in the refurbishing, remodeling and repairing of the plant to ready it for production. At the plant there are some 200 employees represented by numerous unions, only 16 of whom are represented by this Union [R. 17; Tr. 9].

At an orientation meeting in May, 1966, the employees including the machinists were advised on certain matters including some plant rules [R. Exh. 6; Tr. 61].

As of May 1, 1966, the Association and the Union entered into an Adoption Agreement whereby Respondent became a party to the collective bargaining agreement between the Association and the Union. This agreement was executed by the Association and the Union representatives. It was not an individual agreement executed by Respondent [G. C. Exh. 2].

Respondent determined, as do most industrial plants, that it should promulgate plant rules covering its employees including employees represented by the seven unions representing employees at the plant. Detailed

and comprehensive rules were in effect at other plants within the certified unit represented by the California Brewers Association. None of these rules have been negotiated [Tr. 23, 73, 79] although they are similar to the rules issued by Respondent.

Anheuser-Busch, Inc. has a detailed nine-page booklet covering plant rules, safety regulations and precautions, equipment, tools and machines and general rules [R. Exh. 2]. These rules are available to the employees and have been since Anheuser-Busch established its plant in 1953 or 1954 [Tr. 23].

Another member of the Association, Pabst Brewing Company, has a set of rules which are distributed to the employees at the time they are hired. The employees sign a receipt for the rules agreeing to study the rules and any subsequent instructions as issued [R. Exh. 8]. The rules include everyday safety rules and general rules and regulations. It is specifically provided that disciplinary action will be taken for violation of the rules and it is even designated that violation of certain rules are cause for dismissal such as intoxication and punching time cards [R. Exh. 8].

Theo. Hamm Brewing Company has plant rules which have been in effect since 1958. There are 42 rules including penalty guides for first, second, third and fourth offenses, including such penalties as suspension, written reprimands and discharge. Any four violations within a twelve month period are cause for discharge and the penalties prescribed are minimum [R. Exh. 10].

General Brewing Corporation, owner of the Azusa plant prior to Respondent's advent, had a set of rules. Many rules were individually posted on such matters

as punching another employee's time card, bringing whiskey into the plant, punching out at the end of the day, card playing, reporting in in the event of sickness [Tr. 81, 82, 92-93]. Some of these rules were codified into a single document and posted on various bulletin boards. There were no negotiations on these rules nor any demand for negotiations by any of the various unions [Tr. 82, 83].

As stated, Respondent believed it was appropriate to publish plant rules similar to the rules in effect at the main plant in Milwaukee [Tr. 67]. The rules were placed into effect prior to the time Respondent began operations in October, 1966. The proposed rules were first distributed to department heads of the Respondent for suggestions and to see if they violated any collective bargaining agreement [Tr. 59]. The rules were distributed to the employees in September, 1966, a few months after Respondent acquired the plant and before operations began [R. 17].

Many employees represented by other unions signed for the rules without objection. Respondent requested that the employees sign for the rules but did not require that they do so [R. Exh. 3]. With the exception of the demand by the Machinists Union for negotiations, there was no demand for negotiations by any of the unions involved representing collectively the vast majority of the employees, nor any grievance filed [Tr. 62].

Contrary to the statement of Petitioner, at no time did Respondent "flatly refuse[d] to enter into a discussion with the Union at any time about the rules." (Pet. 9). Not only did Respondent take the position at the hearing that they were willing to discuss the meaning and application of the rules [Tr. 25-26] but even

at the time of the promulgation of the rules they were reviewed and discussed upon request (although not negotiated with the other unions). For example, representatives of the Teamster Brewery and Soft Drink Workers Joint Board of California inquired as to how "tough" the Respondent was going to be in connection with the rules about soliciting and gambling [Tr. 65, 66, 86]. A representative of the Operating Engineers Union advised the Respondent that if there was a problem concerning the rules he would file a grievance. A steward for the electricians even volunteered that he felt the rules were a decent set of rules [Tr. 87].

The Machinists Union advised their members not to sign for the rules and the employees objected to the distribution based upon advice from their representative. At no time was there an objection to any specific rule although the Respondent did review and discuss the rules with the employees. The employees had only two basic questions, how the rule on gambling would be enforced and also the rule on soliciting. The Respondent explained on the question of solicitations that they had no objection to the practice of soliciting to help an employee in case of an illness or death but that they wanted to hold the collections down. As to the gambling rule it was explained that the Respondent was concerned about such matters as a large football pool [Tr. 85-86].

There has been no grievance filed concerning the rules or the application of any rule following this discussion with the employees [Tr. 50]. Through the candid testimony of the Union steward it was established that virtually all of the rules were well known to the employees (Petitioner contends to the contrary. Compare Pet. 4,

7). The issuance of the rules did not impose any substantially new or different standards of conduct and were, as testified, already well known and in existence.

The rules that were well known and recognized by the employees include:

1. Theft or misuse of Company equipment;
2. Misuse or removal of Company property;
3. Unauthorized disclosure of Company information;
4. Restricting production;
5. Falsification of records;
6. Bringing narcotics and intoxicating liquors into the plant;
7. Immoral conduct or indecency;
8. Punching time cards;
9. Insubordination;
11. Fighting [G. C. Exh. 4, Major Rules; Tr. 37-40].

The witnesses were also aware of the following rules which are entitled "General Rules":

1. Failure to be at work station;
3. Calling in in advance if absent;
4. Punching time card;
5. Punching out within 20 minutes after end of shift;
10. Neglecting duties and responsibilities;
11. Loitering or wasting time;
12. Creating unsanitary or poor housekeeping conditions;
14. Unauthorized or repeated absenteeism or lateness;

16. Reporting for work in unfit condition;
17. Failure to work safely [G. C. Exh. 4, Tr. 41-45].

The witnesses were also aware of the following Safety rules:

1. Reporting injuries;
2. Using safety devices;
5. Not hitching rides;
6. Using eye and other personal protective equipment;
7. Following other safe practices [G. C. Exh. 4; Tr. 46-47].

Following distribution of the rules to the employees a business representative of the Union called the plant manager and demanded that the Respondent negotiate the rules. The Respondent explained its position that it did not feel that it was under an obligation to do so [Tr. 20].

The business representative of the Union said that they were going to file an unfair labor practice charge, but he made no objection to any particular rule and he did not request an opportunity to discuss the meaning or application of any particular rule. The Respondent has never refused to discuss the application of the rules or the application of any particular rule [Tr. 63, 64, 66]. As stated above, at the hearing before the Trial Examiner, counsel for Respondent reaffirmed this willingness:

> "[T]he Company's position is now and at all times has been that we are willing to discuss these rules as to their meaning or application, and any

> clarification or anything along that line. The Company's position is for the various reasons set forth in the Answer, alleged in the Answer, that they did not have to negotiate, and that is still our position, but we are not opposed to discussing them and attempting to resolve any questions or concerns as to the application of the rules." [Tr. 26].

The Union then sent a formal letter of demand for negotiations [G. C. Exh. 5]. The Respondent did not respond as the letter did not require a response in view of the announced intention of the Union to file an unfair labor practice charge [Tr. 64].

At no time has there been any demand on the Association concerning the issuance or promulgation of the rules by Respondent [Tr. 22].

The hearing was held on February 28, 1967, the Trial Examiner's Decision issued on May 17, 1967, and the Board's Decision on July 20, 1967 [R. 16, 30]. After the hearing and while the case was pending before the Board and even after the case had been decided by the Board, negotiations were conducted between the Association and the Union [R. 32-46]. The 1967 negotiations with the Union commenced on July 10 and concluded on September 2, 1967. Negotiations, as for many years previously, were conducted through the Association and not by the individual companies. The Memorandum Agreement settling the negotiations was executed by the Association representatives on be-

half of the Respondent. There was no demand for individual bargaining. There was no demand by the Union for negotiations concerning plant rules.

This was in spite of the fact that the Union had been specifically and clearly advised of the position of Respondent that the Association was the proper representative and the representative through whom Respondent wished to negotiate.

Respondent moved to reopen the record on the basis of this additional information, which motion was rejected [R. 49].

ARGUMENT.

The Company Did Not Violate Section 8(a)(1) and (5) of the Act.

The Respondent was not obligated to bargain with the Union concerning the issuance of plant rules under the timing and character of the Union's demand for bargaining. This case does not involve a simple refusal to bargain over plant rules upon a proper and timely demand.

If this case simply involved a refusal to bargain concerning plant rules it would not be before this Court. We may concede that plant rules do affect wages, hours and working conditions and are a mandatory subject of bargaining.[4]

Certainly this Court should not be burdened with a petition for enforcement solely involving the question of whether bargaining on plant rules is mandatory. What distinguishes this case from any and all cases cited by Petitioner are the peculiar and controlling circumstances of the Union's demand.

The demand was not a proper demand. It was not made on the proper representative. It was not made at the proper time. There had been a waiver by the Union based upon the conduct of the parties to the agreement, coupled with the language of the agreement itself. Any questions raised should have been resolved through utilization of the grievance procedure. Finally, the Union failed to make a proper demand in recent negotiations with the Association when the contract was

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[4] *N.L.R.B. v. Gulf Power Company* (5th Cir. 1967), 384 F. 2d 822, 825; *Little Rock Downtowner, Inc.*, 145 NLRB 1286, 1304, enforced in part (8th Cir. 1964) 341 F. 2d 1020.

open and a demand on the Association would have been clearly proper. Such failure precludes enforcement.

None of the cases cited by the Petitioner involve solely the issuance of plant rules and a refusal to bargain concerning them (Pet. 6-7). Each of the cases involved a range of activity by the employer of which the alleged changes in plant rules, if any, were only one part and in addition, the changes themselves were substantive and had an immediate effect upon the employee.[5]

The Demand for Bargaining Upon Respondent Alone Was Improper and in Derogation of the Industry-Wide Bargaining Unit and Representation.

Petitioner admits:

> "To be sure, an employer is free to designate agents to represent it in bargaining, and it is lawful for an employer to decline to bargain with a union except through its duly designated representative." (Pet. 11).

The agent and the only agent designated or recognized by the parties as the representative of the employer was the Association. The evidence in the instant case is uncontroverted. All bargaining from the date of the Union's certification has been on an industry-

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[5]*Lloyd A. Fry Roofing Co. v. N.L.R.B.* (9th Cir. 1954), 216 F. 2d 273, 274, 276, employer abolished rest periods with immediate effect upon employees. Did not involve plant rules; *N.L.R.B. v. Tower Hosiery Mills* (4th Cir. 1950), 180 F. 2d 701, 703, cert. denied, 340 U.S. 811, employer unilaterally made wage increases and changed work requirement. Did not involve plant rules; *N.L.R.B. v. Gulf Power Company* (5th Cir. 1967), 384 F. 2d 822, 825, did involve a demand for negotiations concerning safety rules during regular negotiations.

wide basis through the California Brewers Association or its predecessor. All bargaining, whether with this Union or any other union, has been on this basis. There is no evidence of any bargaining on any subject by any individual company. The Union well knew who the bargaining representative was and if it wished to bargain the demand should have been made upon the Association.[6]

So long as an employer does not choose as a representative someone who will make good faith collective bargaining an impossibility, he may choose anyone he desires to represent him, and, this choice must be accepted by the union seated across the bargaining table.[7]

Petitioner suggests that a demand upon the employer "at least initially" is appropriate (Pet. 11). The Respondent has been charged with an illegal refusal to bargain. To prove such an illegal refusal, the burden was upon the General Counsel to establish a proper demand for bargaining. He did not.

Petitioner suggests that the practice of the other employers in unilaterally issuing plant rules indicates

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[6]"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7:: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) *an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;*" 29 U.S.C. §158(b)(1) (Emphasis added).

[7]*Painters' Local 823* (1966), 161 NLRB No. 44, 1967 CCH NLRB 20,857; *Orange Belt District Council of Painters No. 48* (1965), 152 NLRB 1136; *Plasterers' Local 2 AFL-CIO* (1964), 149 NLRB 1264; *Warehousemen Local 986* (1964), 145 NLRB 1511; *Southern California Pipe Trades District No. 16* (1967), 167 NLRB No. 143, 66 LRRM 1233.

that the subject of plant rules was not to be handled by the Association (Pet. 10). To the contrary, as set forth below the practice merely establishes that the Union had waived negotiations on the matter and that Respondent had the right under the contract to issue such rules. Such practice does not indicate nor can it in any way constitute an admission that any bargaining demand on any subject was to be addressed to an individual member rather than through the Association.

Petitioner suggests that the employer's contention that bargaining should have proceeded through the Association was an afterthought (Pet. 11). There is no evidence from which to draw such inference but to the contrary the evidence is that all negotiations have at all times been through the Association. There is no testimony by any Union witness or contention even made that any bargaining had ever been on an individual plant or company basis. Characterizing Respondent's contention as an afterthought is an attempt to find a rationale to support an inadequate and improper demand to bargain with an individual company who has designated an association as its representative.

Petitioner cites certain cases for the proposition that individual bargaining on certain matters is not necessarily inconsistent with group or association or multi-employer bargaining (Pet. 10).[8] None of these cases hold that an employer can be required to bargain

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[8]*Retail Clerks Union, No. 1550 v. N.L.R.B.* (D.C. 1964), 330 F. 2d 210, 213, 216, cert. denied, 379 U.S. 828; *Genesco, Inc. v. Joint Council 13, United Shoe Wkrs. of America* (2d Cir. 1965), 341 F. 2d 482, 488-489; *Western States Regional Council v. N.L.R.B.* (D.C. 1968), ... F. 2d ....., 68 LRRM 2506, 2508-2509, n. 3, No. 21,317, decided June 19, 1968; *The Kroger Co.* (1964), 148 NLRB 569, 573; *N.L.R.B. v. Spun-Jee Corporation* (2d Cir. 1967), 385 F. 2d 379, 383.

individually or other than through his designated representative if all of his bargaining has been through the association and he wishes to continue on that basis. Rather, the cases generally stand for the proposition that individual bargaining on certain matters mutually entered into by the union and an individual employer do not necessarily destroy a multi-employer unit. *Retail Clerks Union, No. 1550 v. N.L.R.B.* (D.C. 1964), 330 F. 2d 210, 213, 216, *cert. denied,* 379 U.S 828 (Pet. 10), may be contrasted with the facts in the present case. In that case there was no formal organization and no delegation of authority. Individual contract proposals were common, and separate agreements were executed by the individual employers. There was a history of individual variations in the contracts and negotiations. One employer's position, as it had a separate pension plan, was that it was not interested in an association-wide pension plan. The Court found that this did not constitute an illegal refusal to bargain.

> ". . . [A]n individual employer or an individual local might by timely action taken in good faith, reserve its position on a particular matter in such manner so as not to be bound at all events by what a majority of their associates might agree to."
>
> ". . . There, as here, the evidence showed such a mélange of group and individual negotiation and agreement, carried on over such a period of time, as to suggest a commonly accepted flexibility in the format of bargaining which would not automatically outlaw every departure from the fold."
>
> *Retail Clerks Union, No. 1550 v. N.L.R.B.,* 330 F. 2d 210, 213, 216.

There was no such mélange of group and individual negotiations in the present case but solely group negotiations.

Genesco, Inc. v. Joint Council 13, United Shoe Wkrs. of America (2d Cir. 1965), 341 F. 2d 482, 488-489 (Pet. 10), was an action for damages for breach of contract and not a proceeding before the National Labor Relations Board although there had been a related NLRB case. The Court stated:

> "Multi-employer bargaining does not altogether preclude demand for specialized treatment of special problems; what is required, if an employer or a union is unwilling to be bound by a general settlement, is that the particularized demand be made early, unequivocally and persistently."
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> *Genesco, Inc. v. Joint Council 13, United Shoe Wkrs. of America,* 341 F. 2d 482, 488-489.

The Union's demand for bargaining in the present case was not made persistently, assuming it was made early and unequivocally. As pointed out above, after being notified specifically of the employer's position on the requirement of Association bargaining, the Union failed in the 1967 negotiations with the Association to even raise the issue. The right of an employer to issue plant rules is not a matter requiring specialized or individual treatment. The right of employers to issue rules is common to all employers and at least arguably a right under the Association contract. The only evidence of any previous demand for bargaining on plant rules was the demand by the Teamsters Union during the 1964 negotiations, which demand was on the Association [Tr. 75].

In *Western States Regional Council v. N.L.R.B.*, (D.C. 1968) ..... F. 2d ....., 68 LRRM 2506, 2508-2509, n. 3, No. 21,317, decided June 19, 1968 (Pet. 10), the court found a multi-employer lockout legal. The union had contended that the exclusions of certain items such as pensions, union security, health and welfare left for local negotiations was not consistent with the multi-employer unit. However such reservations were by mutual consent of the parties. At no time in the present case was there ever any such consent or agreement but to the contrary all negotiations were on the multi-employer basis and through the Association.

The Kroger Co. (1964), 148 NLRB 569, 573 (Pet. 10), a related case to *Retail Clerks Union, No. 1550 v. N.L.R.B., supra,* involved a representation question and whether a unit of one employer out of a multi-plant bargaining unit was appropriate for an election. The Board found that it was not and that although certain matters were left for local determination by the agreement of the parties this did not prevent the existence of a multi-employer unit. Again, there was mutual consent by the parties for reservation of certain matters to particularized individual negotiations.

Petitioner cites *N.L.R.B. v. Spun-Jee Corp.* (1967), 385 F. 2d 379, 383, to support its contention that where a single employer takes action peculiar to it, a request for bargaining made upon that employer is appropriate and creates a bargaining obligation on that employer. Petitioner seems to conclude that an exception to the general rule which protects the right of an employer to choose his own bargaining representative exists where the employer is represented by an association. Such a

conclusion is a misreading of the *Spun-Jee* decision. The case in relevant part provides:

> " 'Multi-employer bargaining does not altogether preclude demand for specialized treatment of special problems; what is required, if an employer or a union is unwilling to be bound by a general settlement, is that the particularized demand be made early, unequivocally and persistently.' * * *"
>
> *N.L.R.B. v. Spun-Jee Corp.*, 385 F. 2d 379, 383.

The case therefore establishes not an exception to the right of an employer to select a representative but merely that individual bargaining on certain matters is not necessarily destructive of multi-employer bargaining. The rule as regards an employer's choice of his bargaining is correctly stated in *Detroit Newspaper Publishers Association v. N.L.R.B.* (6th Cir. 1967), 372 F. 2d 569, 572:

> "After the withdrawal [of the union from the association] in the present case, each publisher would of course still have the right to be represented in separate bargaining by the Association. This is guaranteed by Section 8(b)(1)(B) of the Act and the unions may not interfere with the exercise of this right." (Bracketed material ours.)
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> *Detroit Newspaper Publishers Association v. N.L.R.B.*, 372 F. 2d 569, 572.

Petitioner contends that there was no evidence that the Union in seeking individual bargaining was seeking fragmentation of the multi-employer unit. If the employer had acquiesced in this demand of the Union, it may not have destroyed the multi-employer unit. However, the issue was not peculiar to Respondent but in-

volved the basic right under the contract affecting all employers—the right of an employer to unilaterally issue plant rules. If the Union were successful in this case there would be bound to be an effect upon the other employers. The Union could presumably seek to demand individual bargaining on a multitude of matters because, of course, the Association is not an employer and does not act except through the individual members. Arguably every matter directly affects only individual employers.

There are many cases where unions have been found guilty of a refusal to bargain under Section 8(b)(3) by seeking to bargain with individual members of a multi-employer association unit or in seeking to break up an established unit. Thus in *International Union of Operating Engineers Local 825* (1964), 145 NLRB 952, the Board stated:

> "The Union and Weber likewise violated Section 8(b)(1)(B) and (3) of the Act by threatening to strike and by striking, individual members of the Association in order to force them to withdraw bargaining authority from the Association 'and to enter into individual contracts with the Union [Union at a time when] it was obligated to bargain for an associationwide agreement with the [Association].' "
>
> There can be no doubt that the Union might lawfully have struck the members of the Association in order to achieve its legal objectives, or for breaking a legal stalemate or impasse in its negotiations with the Association, but it is equally clear and well settled that it could not lawfully strike or otherwise coerce the Association employer-members with

an object of causing them to break off from the Association and execute individual contracts with the Union. * * *"

International Union of Operating Engineers Local 825, 145 NLRB 952, 962.

In *Hoisting & Portable Engineers Local 701* (1963), 141 NLRB 469, the union was held to have violated Section 8(b)(3) by attempting to break certain employers off from the multi-employer unit. The Trial Examiner stated in his opinion which was adopted by the Board:

"The whole theory of multiemployer bargaining is based on the premise that the employers who jointly have designated a single bargaining representative, are to be regarded as one employer for applying the rules governing bona fide bargaining. * * *"

Hoisting & Portable Engineers Local 701, 141 NLRB 469, 478.

(As the joint employers are to be regarded as one employer for rules governing bona fide bargaining, the unilateral promulgation of rules at the other companies is most persuasive as establishing waiver as argued below.)

In *Steamfitters Local No. 638* (1968), 170 NLRB No. 44, 67 LRRM 1615, the union sought individual agreements with members of a multi-employer unit and this was found to violate a union's obligation to bargain in good faith.[9]

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[9]See also *International Brotherhood of Teamsters Local* 324 (1960), 127 NLRB 488, remanded *N.L.R.B. v. International Brotherhood of Teamsters, Local 324* (9th Cir. 1961), 296 F. 2d 48.

What the Union is seeking here, assuming Respondent had acceded to its demand, would have been an individual bargain or agreement concerning the plant rules for Respondent without regard to any agreement or the lack of agreement with any of the other companies. The Trial Examiner did not consider the effect of the proposed order if it were followed by Respondent and barganining was undertaken in good faith. The Trial Examiner suggests that bargaining might be required "only to satisfy form" [R. 17] but if so, what is the point? If there are to be substantive and meaningful negotiations, what effect does this have on other members of the Association? Why should Respondent be treated differently from the other members of the Association, and is this not a fragmentation of association-wide bargaining which will be disruptive and harmful to the stability intended?

In another case, *Orange Belt District Council of Painters No. 48* (1965), 152 NLRB 1136, the Board was confronted with a situation where the issue was stated to be the bargaining duty of the union to one member of a multi-employer unit. In finding no duty to bargain the Trial Examiner stated in a decision adopted by the Board:

> "However, I am unable to subscribe to the theory that the Respondent failed in any bargaining *duty* owed to Kaufman. There was none. The Respondent upon this record was bound to negotiate with Tri-County for any agreement affecting Kaufman or his employees. Attempting to deal

directly with Kaufman rather obviously was inconsistent with the duty to bargain with Tri-County but that is not the thrust of the complaint. It owed no bargaining duty to Kaufman (other than as a member of Tri-County) and thus could not have failed to honor a non-existent obligation. The contract offered to Kaufman contained a requirement that Kaufman obtain a performance bond. I am supplied with much authority to the effect that an employer is not required to bargain about such a bond but the authority is irrelevant to the question here. *It still remains the fact that the Respondent had no duty to bargain with Kaufman, indeed, it seems to have had a duty not to do so.* * * *" (Emphasis added).

Orange Belt District Council of Painters No. 48, 152 NLRB 1136, 1141.

The demand by the Union in the instant case to withdraw from multi-employer bargaining as to Respondent's plant rules was not timely and unequivocal. As the Board stated in *W. S. Ponton* (1951), 93 NLRB 924, a case involving an attempt for individual bargaining by an employer:

"We have held that although an employer is free to abandon participation in group bargaining, this must be done at an appropriate time. To permit the Employer to alter its course from joint to individual action *during an existing contract would not, in our opinion,* make for that stability in collective bargaining which the Act seeks to promote. * * *" (Emphasis added).

W. S. Ponton, 93 NLRB 924, 926.

The same rules as to proper withdrawal apply to unions as to the employer members of a multi-employer unit.[10]

The Issuance of the Plant Rules Did Not in Any Real Sense Substantially and Unilaterally Change Working Conditions. Such Rules Were Mainly and Basically a Codification of Existing Rules Well Known to the Employees.

As established above, the rules are not basically, essentially or substantially new rules. They are merely a statement of rules of conduct generally expected of all employees in an industrial plant and from the evidence in this case most of them were well known to the employees. There was no substantive change in any term and condition of employment. The rules constituted what the employer expected of the employees, and as stated below, if and when the employer took action concerning such violations, the matter was subject to attack and testing under the grievance and arbitration proceedings. The issuance of the rules themselves did not substantially change any condition of employment.

The Board has upheld the unilateral posting of existing plant rules. In *Mason & Hughes, Inc.* (1949), 86 NLRB 848, the Board in reversing the trial examiner's finding of an 8(a)(5) violation, stated:

> "There is no showing in the record that the shop rules were different in any particular from

[10]*The Evening News Association* (1965), 154 NLRB 1494, aff'd. (6th Cir. 1967) 372 F. 2d 569; *Hearst Consolidated Publications, Inc.* (1965), 156 NLRB 210; *Adams Furnace Co., Inc.* (1966), 159 NLRB 1792.

> those which had previously been in effect. In these circumstances we are not persuaded that the mere posting of the existing rules constitute a refusal on the part of the Respondent (Company) to comply with its statutory duty to bargain."
>
> *Mason & Hughes, Inc.,* 86 NLRB 848, 850.

Similarly, if the work rules were established to protect the employer's time from activities inconsistent therewith, there is no refusal to bargain. *W. T. Smith Lumber Co.* (1948), 79 NLRB 606.

Petitioner suggests and gives as examples of rules which had not previously been in force rules prohibiting certain forms of gambling such as card playing and large football pools, collections and the alleged right to refuse to work overtime (Pet. 7). Gambling, including card playing for money, is a violation of state law as are football pools.[11] How publishing a rule to this effect could constitute a substantial change in employment, we do not understand. As to the collections, the evidence was that this was one of the areas that the employer clarified for the employees in response to a question [Tr. 85]. There was no evidence

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[11]"Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employe, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, stud-horse poker, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit or other representative of value, and every person who plays or bets at or against any of said prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars nor not more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment." California Penal Code §330.

that the Respondent was taking away any right previously enjoyed.

As to the rule against refusing to work overtime, the Union witness merely stated that he did not know that he could refuse overtime [Tr. 85]. If there was a right to refuse under the collective bargaining agreement, and the Trial Examiner contends there arguably may have been, this is all the more reason why the matter should have been left to the grievance and arbitration procedures rather than being presented to the Labor Board [Compare R. 18].

The proposed penalties included in the rule books were, of course, not self-executing (Pet. 7). If an employee were discharged or otherwise disciplined for violation of any rule, the matter would be subject to the grievance and arbitration provisions and particularly the just cause provision. This is where any dispute concerning the effect of the issuance of the plant rules belonged. If action was taken against any employee for any violation there was a ready remedy available to it assuming the Union did not wish to test the question of the issuance through the grievance and arbitration procedures.

Petitioner incorrectly states that the Respondent "flatly refused to enter into any discussion of any kind with the Union about the rules." [Pet. 9]. This is contrary to the evidence. Respondent's expressed willingness to discuss the rules, to clarify the rules (although not to "bargain" on them), has been present since the rules were first issued. Other unions availed themselves of this right and the questions were easily and promptly resolved to the satisfaction of the other unions without any grievances or demands for bargaining. In fact,

at the time of the promulgation of the rules Respondent explained and clarified the rules to the employees represented by the Machinists Union.

Similarly, the Petitioner states "the facts show a total refusal to bargain about the rules." [Pet. 9]. This is not correct and has never been the position of the employer. The position of the employer is and has been throughout that it did not have to bargain on the basis of the request made by the Union in this case. There is no evidence to conclude that a timely request in negotiations upon the Association would not have been honored. The refusal was not a total refusal but a refusal only because of the manner and timing of the demand by the Union.

N.L.R.B. v. Hilton Mobile Homes (1967), 155 NLRB 873, enforcement denied in part (8th Cir.), 387 F. 2d 7, 12 (Pet. 7), as decided by the Board, was the only case cited by the Trial Examiner [R. 18]. The Board had found an unlawful refusal to bargain in the unilateral issuance of a rule prohibiting the taking of tool boxes home. The Court in fact found:

> "In view of the facts: that the record does not support a finding that the tool box rule was a subject of mandatory bargaining; that there is substantial evidence in the record that the parties had bargained to an impasse on the issue; and that there is no reason for the Board's disparate treatment of the February and April rules, we decline to enforce the Board's order insofar as it relates to the tool box issue."
>
> *N.L.R.B. v. Hilton Mobile Homes,* 387 F. 2d 7, 12.

Respondent's action in isolation. As the obligation of the Union was to bargain through the Association and on a multi-employer basis, so also must the question of waiver be considered on an industry-wide basis. The practice of the companies to issue plant rules under the same contract constitutes a waiver of the right to demand bargaining concerning such issuance at least during the contract.

In *Pacific Coast Assn. of Pulp & Paper Manufacturers* (9th Cir. 1961), 133 NLRB 690, 691, n. 2, enf'd 304 F. 2d 760, 763-765 (Pet. 12), over a period of years the parties had agreed not to discuss pensions on a multi-employer basis but rather on an individual basis. The union then demanded to negotiate during regular contract negotiations with the Association concerning pensions rather than with the individual companies. The Board found that this was a proper and enforceable demand and that the previous waiver did not continue into the current negotiations. The Board adopted the decision of the Trial Examiner who stated:

> "The closest analogy that comes to mind is where an individual employer and the representative of his employees, agree that for the term of a contract or for some indefinite period, certain matters germane to collective bargaining, such as merit wage increases, be omitted from the bargaining agenda. This would not, and indeed could not, mean that an agreement had thereby been reached that the employer no longer had the authority to bargain in such matters or that he might not at some future appropriate time, on request, be required to exercise that authority."
>
> *Pacific Coast Assn. of Pulp & Paper Manufacturers,* 133 NLRB 690, 698.

We are not contending that the Union is forever bound to Association bargaining or by its waiver of the right to object under the contract to the issuance of these plant rules. In any new negotiations, when the contract is open, the Union may be free to withdraw from Association bargaining and demand individual bargaining on the rules or any other matter or to bargain on an Association-wide basis concerning plant rules.

Support for the employer's position is found in the recent subcontracting cases holding that a history of subcontracting may prevent a finding of a refusal to bargain.

In *Westinghouse Electric Corp.* (1956), 150 NLRB 1574, subcontracting was a long standing practice and the union had sought restrictions that were rejected by the employer. The Board set forth the following test to determine when an employer can act unilaterally:

> "In sum—bearing in mind particularly that the recurrent contracting out of work here in question was motivated solely by economic considerations; that it comported with the traditional methods by which the Respondent conducted its business operations; that it did not during the period here in question vary significantly in kind or degree from what had been customary under past established practice; that it had no demonstrable adverse impact on employees in the unit; and that the Union had the opportunity to bargain about changes in existing subcontracting practices at *general* negotiating meetings—for all these reasons cumulatively, we conclude that Respondent did not

violate its statutory bargaining obligation by failing to invite union participation in individual subcontracting decisions." (Emphasis added).[12]

Westinghouse Electric Corp., 150 NLRB 1574, 1577..

Petitioner sought to distinguish these cases on various grounds (Pet. 13-14). For example, he stated some of the prior practices in the subcontracting cases involved thousands of contracts over a yearly period and "was a constant fact of life for the unit employees". Plant rules are also a constant fact of life and no employer could long exist without standards of conduct whether they be published in a rule book, oral or on an *ad hoc* basis. Plant rules affecting daily conduct are something that, contrary to Petitioner's contention, "the employees had to cope with on a frequent basis" (Pet. 14).

Petitioner also contended that one of the rationales of the subcontracting cases was the absence of a significant detriment to the unit employees, the presence of contractual provisions and the opportunity to bargain subsequently afforded. As stated above, the plant rules in no real, substantial or significant sense restricted the employees' actions in important areas. *District 50, United Mine Workers, Local 13942 v. N.L.R.B., supra* (Pet. 14). To take the extreme example, certainly the publication of the rule against theft did not interfere with any previously unfettered right, nor, for that matter, did the rule on employees punching another employee's time card. Practically all of the rules were

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[12]See also: *Kennecott Copper Corp.* (1964), 148 NLRB 1653; *Motorsearch Co. & Kems Corp.* (1962), 138 NLRB 1490; *Shell Oil Co.* (1964), 149 NLRB 283.

standard, well known and well accepted rules and so testified to by the Union witnesses [Tr. 37-47].

The only rules that Petitioner enumerates as changes are the rules relating to gambling, to collections among employees and to the obligation to work overtime if requested. As stated, gambling is against the State law in any event with or without a plant rule. It may well be questioned whether the alleged right of employees to take up collections for other employees is a mandatory subject for bargaining but in any event any modest limitation on it could hardly be a significant detriment. Employers generally are considered to have the right to require employees to work overtime. Petitioner suggests that the contract arguably protects such a right (Pet. 7). This, of course, leads to the argument that any question should have been submitted to the grievance procedure where it could have been properly tested.

The question of whether the contracual provisions empowered the employer to issue plant rules is a matter that can best be solved under the grievance procedure. The more that the Board or a court injects itself into this area, the more confused the issue of what is the proper forum will be. Finally, there was ample opportunity for the Union to bargain at a subsequent time about the right of an employer to issue plant rules. Surprisingly enough the Union failed to demand to negotiate on the issuance of plant rules in the 1967 negotiations.

The contractual provisions relating to safety rules and just cause are set out in Petitioner's Brief (Pet. 15). The term "safety rule" is used in the agreement itself and clearly contemplates such rules. The just

cause provision indicates if it would not otherwise be clear that the employer takes the action to establish certain standards as to what he considers to be just cause. As stated below, his action in connection with such rules or standards are subject to the grievance procedure. Publication of the rules did nothing to increase the right of the Respondent beyond that already provided in the agreement.

As Petitioner recognizes, a just cause provision in an agreement is a standard general provision appearing in most collective bargaining agreements (Pet. 16). Petitioner suggests that the term "just cause" does not give the right to the employer to decide in the first instance what is just cause, or to publish rules concerning his beliefs. Petitioner states:

> "Rather, the phrase, 'just cause,' would clearly comprehend only what had traditionally been agreed to be a ground for discharge in the plant in the past, as found in the express terms of the contract, the prior written plant rules, or the practice of the parties." (Pet. 17).

It would be remarkable if the term "just cause" was static and limited by express terms of the agreement, prior plant rules or practice or what had been agreed upon. Conditions and events constantly change and occur. The reason for the extensive use of the term "just cause" is to give the employer latitude in determining what is just cause in particular situations, subject to review and affirmance or reversal by an arbitrator. Plant rules provide guidance to employees as to the employer's position on just cause prior to taking action.

The alleged absence of specific language expressly authorizing the unilateral issuance of plant rules does not of course imply that Respondent does not have such right. Absent a collective bargaining agreement or a bargaining representative, an employer undoubtedly has the right to unilaterally issue plant rules. The collective bargaining agreement limits and controls the rights that management otherwise has. However many arbitrators in interpreting collective bargaining agreements rely on the reserved rights concept and hold that an employer retains the rights that it previously had subject to any limitations or restrictions contained in the agreement. As set forth in the following section of this brief, at the very least this is an argument that should have been addressed to an arbitrator and answered by him.

Arbitrators charged with interpreting and applying collective bargaining agreements generally accept and recognize the right of the employer to issue plant rules even without specific contractual authority. We submit that the reasoning of arbitrators under collective bargaining agreements is persuasive as to whether the employer had a right under the contract to issue such rules. As stated below, the grievance and arbitration procedure was the one agreed to by the parties and should have been followed in this case.

Arbitrator I. Robert Fernberg in *Bethlehem Steel Co.* (1954), considered a series of thirty-seven rules with accompanying penalties unilaterally promulgated by the company:

> "[I]t is undoubtedly true that Management has the right to issue rules such as here were promulgated, and opposition thereto by union repre-

sentatives finds no support in any valid theory of labor relations or in the contract between the parties hereto. The rules here issued constitute merely a series of acts or offenses which the Company stated it would consider as justifying disciplinary action, and sets forth the penalties to be imposed for each successive offense. Under the agreement between the parties, the Company is given the right to discipline or discharge employees for 'just cause.' The rules constituted merely an announcement by the Company of what it would consider 'just cause.' Whether any such alleged offense actually is 'just cause' may be tested by the Union through the grievance procedure when and if it has been utilized by the Company as the basis for disciplinary action. Until that time, however, the rules serve a salutary purpose in indicating in advance to the employees the attitude of the company with regard to certain conduct."

(*Contracts and Unfair Labor Practices Bernard Dunau,* 57 Col. L.R. 52, 79).

"It is generally held by Arbitrators that in the absence of restrictions or prohibitions in the Agreement, the Company may unilaterally establish and put into effect working rules governing working conditions, provided the same are not unreasonable, capricious or constitute an abuse of discretion on the part of Management. Such rules are an aspect of Management's direction of working forces and production. In most instances, such rules are neither included n the Labor-Management Agreement nor made the subject of bargaining."

Corhart Refracteries Co. (1963), 40 LA 898, 901-902.

"Absent any specific clause in the contract obligating the Company to negotiate, bargain or consult with the Union before instituting any safety rules, the management clause implicitly empowers the Company to institute [them] unilaterally.

* * * * *

"Whether or not the Company is obligated to bargain, must be judged in the context of the specific circumstances and the relevant contractual language pertaining to each such new condition of employment. And it has already been shown that both under the contract and in the light of precedent, the Company has the right to institute safety rules unilaterally. To be sure, there is nothing to bar the Union from changing the *procedure* of instituting safety rules by getting agreement thereto from the Company during contract negotiations or at other times. But no such agreement has so far been obtained. In fact, the Union has never ever requested such a procedural change during the various contract negotiations in the past, although it has frequently asked for changes in specific safety rules during these negotiations."

Linde Co. (1960), 34 LA 721, 724-725.[13]

The "clear and unmistakable" test enunciated by the Board and some courts in determining whether there is a waiver of bargaining rights may be proper and in furtherance of the policies of the Act in many cases

[13]See also: *Dayton Steel Foundry Co.* (1958), 31 LA 865, 869; *Sylvania Electric Products, Inc.* (1958), 32 LA 1025, 1027; *Gravely Tractors, Inc.* (1958), 31 LA 132, 135-136; *Butler Manufacturing Co.* (1968), 50 LA 109.

(Pet. 15-16). However, we submit that the evidence is sufficient to require a finding of waiver in the instant case based upon the practice of the parties, the contractual provisions and the availability of the grievance and arbitration provisions.

Any Question of Waiver or the Right of the Respondent to Issue Rules Should Have Been Left to the Grievance and Arbitration Procedures Available.

The Union had the option of testing the right of Respondent to issue the rules through the grievance and arbitration procedure [G. C. Exh. 3]. It also had the right to wait until action was actually taken against an employee and then have the propriety of the action reviewed through the grievance procedure. The rule book itself recognizes that the rules are subject to the agreement.

> "The foregoing rules are subject to the provisions of State and Federal laws and *any applicable collective bargaining agreements* which employees must observe at all times." [last page, G. C. Exh. 4] (Emphasis added).

There may be cases where the Board can act and should act even though there is some arguable remedy available under the collective bargaining agreement. The cases cited by Petitioner reflect the policy of the Board and the courts as to the proper balance and accommodation between the two remedies (Pet. 19).

The fact that the matter has not now been submitted to arbitration is, to our mind, irrelevant.[14] What we are contending is that it should have been referred to the grievance and arbitration provision in the first instance. This is and has been our position and if the Board had acted in this manner there would be no duplication or delay. We hardly believe that the delay caused by the Board's assumption of jurisdiction is a compelling reason to find that the Board processes were properly used. If the position, advanced by the Respondent from the earliest stages of the proceeding, had been adopted there would have been far less delay than in the route taken by the Board.

We submit that an arbitration decision as to whether the Respondent had the right under the contract to issue the rules would put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act. We do not believe that it was ever intended that the Board should be involved in cases which are properly grievance matters during the term of a collective bargaining agreement. It is hard to see how the Petitioner can contend that an arbitrator's decision showing a right to issue these rules could be "repugnant to the purposes and policies of the Act." (Pet. 20). These purposes, among others, are to have matters and controversies resolved expeditiously, without delay to the parties and in the forum agreed. It is obvious that the question would have been more expeditiously handled through the grievance and arbitration procedures than through the Board.

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[14]Compare *N.L.R.B. v. Huttig Sash & Door Co.* (8th Cir. 1967), 377 F. 2d 964, 970 (Pet. 18, 19); *N.L.R.B. v. Acme Industrial Co.* (1967), 385 U.S. 432.

The other grounds argued by Respondent as defenses for its alleged refusal to bargain would never have arisen or would have been resolved through grievance and arbitration. Thus the issue of the demand on the proper party would not have even been involved. Grievances are on an individual company basis [G. C. Exh. 3, Article VI]. The questions of waiver by practice and under the contractual language would be decided by the arbitrator in interpreting whether there had been a violation of the contract.

The Board Improperly Refused to Reopen the Record to Admit the Additional Evidence Establishing the Failure of the Union to Demand Bargaining Through the Association on the Issuance of Plant Rules.

In the 1967 negotiations, long after the Union had been clearly and specifically advised that bargaining had to be on an Association basis and that the Association was the designated and proper employer representative, the Union was engaged in regular contract negotiations with the Association. The Union made no effort or attempt to bargain concerning plant rules by demand either to Respondent or the Association.

The Board has recognized in analogous cases the obligation on the union to make a proper and timely demand for bargaining. Thus in *E-Z Mills Inc.* (1953), 106 NLRB 1039, 1047, the union alleged that the unilateral closing of the plant cafeteria constituted a refusal to bargain. The Trial Examiner stated in a decision adopted by the Board in dismissing the complaint:

> "Since the Union was the representative of the Bennington employees, this unilateral action of

the Respondent would ordinarily constitute a refusal to bargain. However, as has been seen, the parties met and negotiated thereafter. The Union did not indicate at any of the bargaining sessions that it wished to bargain about the matters, or to have the action withdrawn. Indeed, at one of the meetings, one of the employees specifically brought up the subject of the cafeteria closing and the credit union withdrawal, but the Union's regional director, and its principal negotiator, Salerno, indicated that the Union did not wish to discuss the subjects, saying that there were 'more important things than grievances' to discuss. The record does not reveal that the Respondent refused to talk about the matters. It is consequently found that these questions were waived by the Union, or that it acquiesced to the Respondent's action, and that there was therefore no refusal to bargain respecting them."

E-Z Mills Inc., 106 NLRB 1039, 1047.

Similarly, in *Justesen's Food Stores, Inc.* (1966), 160 NLRB 687, the employer unilaterally installed an automatic meat wrapping machine in his store. In finding that there was no violation of the Act, the Board stated:

"'In agreeing with the Trial Examiner's dismissal of that part of the 8(a)(5) allegation which concerns unilateral installation by the Respondents of a wrapping machine and resultant layoff of two employees in the Bakersfield unit, we do so because the Union, Party to the Contract and Charging Party here, failed to protest. Although advised of Respondents' unilateral action in December 1964,

immediately after the layoffs of Couch and Manuel, the Union's sole protest came in June 1965 when it filed a first amended charge alleging that its bargaining contract with the Respondents required negotiations when 'new' methods were introduced. At no time while attempting to bargain for a new contract—including a meeting with the Respondents in January 1965—did the Union raise this issue or in any way request the Respondents to bargain about it. At the hearing it alluded to the problem during a record discussion of the contract, but now, in its exceptions and brief, the Union has not urged that the Respondents' unilateral action exceeded the authority conferred by the new methods clause of the contract then in effect. In the circumstances we cannot find that the Respondents failed to bargain in good faith with respect to the installation of automatic machinery in the meat department and the layoff of employees.' "

Justesen's Food Stores, Inc., 160 NLRB 687, 688.[15]

The Petitioner contends that the Board's ruling was correct and first suggests that there is relevance to the fact that the demand on other than the proper representative was only one defense urged (Pet. 21). A review of the grounds advanced shows that none of the other grounds would impede making the demand on the Association during contract negotiations. The waiv-

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[15]See also: *Lakeland Cement Co.*, (1961), 130 NLRB 1365; *American Federation, Etc. v. National Labor Rel. Bd.*, (5th Cir. 1952), 197 F. 2d 451, 454; *U. S. Lingerie Corporation* (1968), 170 NLRB No. 77, 67 LRRM 1482; *L. J. Dreiling Motors Co.* (1967), 168 NLRB No. 67, 67 LRRM 1071.

er by practice would not operate to prevent the Union at any time in the future from negotiating on plant rules but only during the term of the contract. The same is true with the contractual provisions constituting waiver. Obviously, the same is true with the requirement that the Union process the matter through grievance and arbitration before resorting to the Board. If the contract is open for negotiations, the question of the right to issue plant rules is open for negotiations too and is, as admitted, a mandatory subject for bargaining if the demand and timing are proper.

Petitioner is just wrong when it asserts that there was a "total refusal to bargain" (Pet. 21). The Union demanded bargaining; the employer refused asserting it was not obligated to do so. There is no evidence of any request by the Union for the employer to set forth its grounds and the first occasion to do so was as part of the NLRB proceeding.

Petitioner cites various cases to the effect that a claim by Respondent that it has ceased and desisted from committing an unfair labor practice is not an adequate remedy nor a barrier to enforcement (Pet. 21). These cases are not relevant for, as stated and established above, the employer had not committed an unlawful refusal to bargain. The only difference between the time the Union first made its demand to bargain and the hearing is that at the hearing the employer explicated its reasons. The lack of obligation was the same at both times. Respondent does not now and it has never contended that it had no obligation to bargain under any circumstances. It was not confronted with any such circumstances but only with an improper and untimely demand.

Conclusion.

For the reasons set forth above, we respectfully submit that this Court should issue an order denying enforcement.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
By WILLARD Z. CARR, JR.,
Attorneys for Respondent
Miller Brewing Company.